Supreme Court, U. S.
FILED
MAY 6 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979

No. 79-1769

STEVEN CHARLES SANDERS,
Petitioner,

vs.

KENNETH OLIVER AND KANSAS ATTORNEY GENERAL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

JOHN C. HUMPAGE
HUMPAGE, BERGER AND HOFFMAN
314 West Seventh Street
Topeka, Kansas 66603
Phone: (913) 235-5351
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

SUBJECT INDEX

Table of Authorities II
Opinion Below 2
Jurisdiction 2
Questions Presented 3
Constitutional Provisions Involved 3
Statement of the Case 4
Reasons for Granting the Writ—
(A) The Opinion of the United States Court of Appeals for the Tenth Circuit Is in Conflict With and Misconstrues Decisions of This Honorable Court on Federal Questions 6
Conclusion 12

INDEX TO APPENDICES

Appendix A - Opinion of the United States Court of Appeals, Tenth Circuit A1
Appendix B - The Order of the United States Court of Appeals, Tenth Circuit, Overruling the Petitioner's Petition for a Rehearing En Banc A10

Table of Authorities Cited

CASES

Brewer v. Williams, 430 U.S. 387, 422, 97 S.Ct. 1232, 51 L.Ed.2d 424 7
Franks v. Delaware, 438 U.S. 154, 165, 171, 172, 98 S.Ct. 2674, 57 L.Ed.2d 667 ..... 7, 11, 12
Gates v. Henderson, 568 F.2d 830 (2nd Cir. 1977), *cert. denied,* 434 U.S. 1038 6
Holmberg v. Parratt, 548 F.2d 745 (8th Cir. 1977), *cert. denied,* 431 U.S. 969 6

Jackson v. Virginia, ... U.S. ....., 99 S.Ct. ....., 61 L.Ed.2d 560 (3-21-79) 7

Sanders v. Kansas, 434 U.S. 833, *reh. denied*, 434 U.S. 1002 (19....) 4

State v. Sanders, 222 Kan. 189, 190, 191, 193, 563 P.2d 461 (19....) 5

Stone v. Powell, 428 U.S. 465, 469, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) 5, 6, 10, 11

Townsend v. Sain, 373 U.S. 293, 313, 315, 83 S.Ct. 745, 9 L.Ed.2d 770 7

STATUTES AND RULES

U.S. Const., Amend. IV 2, 3, 5, 6, 12

U.S. Const., Amend. V 3, 5, 6, 12

28 U.S.C. 1254(1) 2

28 U.S.C. 2254 ..... 1, 2, 4, 6

Kansas Statutes Annotated 21-4501(b) 1

Kansas Statutes Annotated 21-4503(b) 1

Kansas Statutes Annotated 65-4105 ..... 7, 11

Kansas Statutes Annotated 65-4127(b) 1

In the Supreme Court of the United States

October Term, 1979

No. .....

STEVEN CHARLES SANDERS,
Petitioner,

vs.

KENNETH OLIVER AND KANSAS ATTORNEY GENERAL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner-Appellant, Steven Charles Sanders, prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment of the United States District Court for the District of Kansas dismissing his Petition for Habeas Corpus, same being filed pursuant to 28 U.S.C. 2254.

The Petitioner, while an inmate at the Kansas State Penitentiary, subsequent to his incarceration as a result of his conviction in the District Court of Wyandotte County, Kansas, Case No. 20864-CR, was sentenced for a period of not less than one (1) nor more than ten (10) years to the custody of the Director of Penal Institutions, pursuant to K.S.A. 65-4127(b), K.S.A. 21-4501(b) and K.S.A. 21-4503(b).

OPINION BELOW

The United States District Court for the District of Kansas dismissed the Petitioner-Appellant's Petition for Habeas Corpus, 28 U.S.C. 2254, on May 2, 1978, the Court refused to modify and correct the Court's findings and judgment on September 4, 1978. The United States District Court for the District of Kansas acknowledged the falsification that the Petitioner had developed in the search warrant affidavit in his state pre-trial Motion to Suppress, along with a further finding that after making the initial showing of falsity the State Trial Court refused to let the Petitioner call additional witnesses in support thereof. The Court, however, concluded that this did not deny the Petitioner a full and fair hearing because the Petitioner's Fourth Amendment claim registered herein had been fully litigated in State Courts. On appeal, the United States Court of Appeals, Tenth Circuit, affirmed the District Court's judgment on December 20, 1979, further denied the Petitioner's Motion for Rehearing En Banc on April 9, 1980. The decision of the United States Court of Appeals, Tenth Circuit, is not reported as yet, however, the Court's decision is attached hereto as Appendix A, the Court's order denying the Petitioner's Petition for Rehearing En Banc on April 9, 1980, is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1), along with the Court's Rule 19(b).

The issues, along with the Federal Constitutional questions sought to be reviewed by this Honorable Court, were developed, raised and re-raised in all courts below, which is readily evidenced in reviewing the Opinion of the United States Court of Appeals for the Tenth Circuit. (A1-9)

QUESTIONS PRESENTED

The Federal Constitutional issues sought to be resolved herein are of extreme constitutional importance as the Opinion of the United States Court of Appeals for the Tenth Circuit reasons that though the Petitioner is denied a forum to fully litigate his Fourth Amendment claims, once they are registered prevents federal review:

(1) Are federal courts prevented from reviewing Fourth Amendment claims adjudicated in State Courts on direct appeal that were additionally denied review by this Honorable Court without exception?

(2) Are federal courts precluded from reviewing Fourth Amendment claims raised in State Courts on direct appeal when this Court denied certiorari to the State Courts, where State Courts refused to allow a full and complete evidentiary hearing in support of a Petitioner's Fourth Amendment complaints?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution (U.S. Const., Amend. IV) provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution (U.S. Const., Amend. V) provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor, shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

This is an appeal from relief sought in the United States District Court for the District of Kansas by the Petitioner-Appellant while an inmate at the Kansas State Penitentiary, pursuant to 28 U.S.C. 2254.

The United States District Court did grant the Petitioner a hearing in relation to some of his complaints herein subsequent to the Petitioner's Motion filed with the Court seeking to modify and correct the Court's judgment of May 2, 1978. (R.V.I, 262) The Court ultimately denying the relief sought by the Petitioner in relation to said Motion to Modify. (R.V.I, 271)

The Petitioner has raised and re-raised the issues he now seeks reviewed by this Honorable Court ab initio, all of the Petitioner's complaints were denied, rejected or unnoted. *Sanders v. Kansas,* 434 U.S. 833, *reh. denied,* 434 U.S. 1002. The issues sought to be resolved by the Petitioner in the United States District Court were raised in the Kansas Supreme Court, however, the Kansas Supreme Court in ruling on these complaints denied the existence of the obvious deficiencies viewed in the search warrant affidavit submitted in relation to the complained of search warrant herein, however, the Kansas Supreme Court, noting the Petitioner's complaint directed at reckless material

false representations of fact viewed in the search warrant affidavit, acknowledged their being, however denied their existence. In addition, the Kansas Supreme Court further condoned the Trial Court's refusal to allow the Petitioner to submit further evidence from witnesses immediately available to the State Trial Court in support of this issue. *State v. Sanders,* 222 Kan. 189, 190, 191, 193, 563 P.2d 461. The United States District Court for the District of Kansas recognized the issues the Appellant sought reviewed before this Honorable Court, namely, the issue of reckless material false representations of fact and the State Trial Court's refusal to afford the Appellant a "FULL AND FAIR HEARING" in relation thereto. (R.V.I, 237, 271) The United States District Court, however, did issue a certificate of probable cause to allow the Appellant to seek review before the United States Court of Appeals for the Tenth Circuit on these issues. (R.V.I, 279)

The United States Court of Appeals, Tenth Circuit, recognized the Petitioner's complaint directed at the Fourth and Fifth Amendment violations, however found these issues were raised in the State Courts and "one complete and unrestricted evidentiary hearing with subsequent review by the State Courts of the issue and the facts so developed would *seem* to be sufficient under *Stone*".

REASONS FOR GRANTING THE WRIT

A. The Opinion of the United States Court of Appeals for the Tenth Circuit Is in Conflict With and Misconstrues Decisions of This Honorable Court on Federal Questions.

The issues presented herein to the United States Court of Appeals for the Tenth Circuit that the Petitioner seeks review of are of the greatest constitutional importance because of the existing confusions found amongst the Federal Courts in denying review to State Habeas Corpus petitioners when the petitioner complaints are directed at the Fourth Amendment to the United States Constitution when the complaints have been previously reviewed fully or in part by the State Courts on direct appeal, thereafter review is sought in this Honorable Court and denied, the Petitioner's plight herein. See *Holmberg v. Parratt,* 548 F.2d 745 (8th Cir. 1977), *cert. denied,* 431 U.S. 969; *Gates v. Henderson,* 568 F.2d 830 (2nd Cir. 1977), *cert. denied,* 434 U.S. 1038; Sanders v. Kenneth Oliver and Kansas Attorney General. (A1-9) The confusion has now ripened to the extent that Fifth Amendment Complaints by State Habeas Corpus petitioners in the federal system have now been rejected solely on the basis the issue had been raised in the state judicial system on direct appeal and rejected. (A8)

This Court's rejection of sought after federal review of Fourth Amendment complaints under the purview of 28 U.S.C. 2254 was not a total eclipse of a petitioner's right to review but was conditioned on the Petitioner being afforded by the State Court a "full and fair litigation of a Fourth Amendment claim". *Stone v. Powell,* 428 U.S. 465, 469, 96 S.Ct. 3037, 49 L.Ed.2d 1067. The Court's Opinion reflecting a full and fair litigation is not available unless

"the state factual determination is fairly supported by the record as a whole and was not arrived at by the use of sub-federal standards." *Townsend v. Sain,* 373 U.S. 293, 313, 315, 83 S.Ct. 745, 9 L.Ed.2d 770. This Honorable Court has never precluded federal review of so serious a federal constitutional question that is viewed in the record herein, rejection of a petitioner's federal constitutional rights by State Courts by the employment of a fact finding process clearly not supported in the record. If this be the case, then federal review would be denied a petitioner who attempted to employ this Court's fiats as viewed in *Franks v. Delaware,* 438 U.S. 154, 171, 172, 98 S.Ct. 2674, 57 L.Ed.2d 667. Compare *Brewer v. Williams,* 430 U.S. 387, 422, 97 S.Ct. 1232, 51 L.Ed.2d 424; *Jackson v. Virginia,* ..... U.S. ....., 99 S.Ct. ....., 61 L.Ed.2d 560 (3-21-79).

In reviewing the record, along with the Opinion of the United States Court of Appeals, Tenth Circuit, there can be but one finding, your Petitioner was both denied a factual determination clearly supported by the record and further denied a forum to fully litigate the issue of material deliberate falsehoods after the reckless falsehoods viewed herein were established by both substantial evidence and by a preponderance of the evidence.

The complained of search warrant affidavit of the affiant Jack L. Hartman, Special Agent, A.G.'s office, the material portions of same read as follows:

> "That he has reason to believe that on the premises known as 35 South 15th Street (upstairs apt.) in the Wyandotte District of Kansas, there is now being concealed certain property, namely Cannabis Sativa L. (commonly known as Marijuana), Cocaine, and Heroin which are illegal for possession by the Uniform Controlled Substance Act, K.S.A. 65-4105."

> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: The assigning officer swears and affirms that he has information from a confidential informant, who he has known for several months who has given him information in the past that has proven to be correct, that at the above address is secreted Heroin and Cocaine in one ounce lots and Marijuana in one pound lots. The confidential informant states that this is the residence of Steve Sanders, and he has purchased the above-mentioned items within the last 24 hours." (A2, 3)

The United States Court of Appeals, Tenth Circuit, generously noted that the affidavit was indeed incorrect in several particulars (A3) however, did not in any fashion reject the findings of the United States District Court for the District of Kansas in the Court's Memorandum Opinion of May 2, 1978 (R.V.I, 237-257):

> "Suffice it to say at this point that although petitioner produced evidence which, at the least, brought into serious question the statements which were contained in the affidavit, both courts denied the motion to suppress." (R.V.I, 238)

> "The affirmance of the petitioner's conviction in the Kansas Supreme Court was based largely on the 'no attack rule' existing in Kansas." (R.V.I, 238)

> "The affiant testified that he had known the informant mentioned in the affidavit (one Mickey Harris) since April 27, 1974. That the affidavit should have reflected that the affiant knew the informant several weeks rather than several months; that the informant had provided affiant other 'leads' before May 12, 1974, but none of the leads had 'proven out' at that time; however, the informant had told Hartman where he could

buy narcotics, and Hartman made such a 'buy' before May 12; Hartman further testified that he did have personal knowledge as to the situation which was not put in the affidavit. Hartman had watched the house which contained Sanders' apartment for three days and had seen the 'comings and goings'. He stated 'I have seen marijuana carried from the place, yes.'" (R.V.I, 243)

"Hartman further testified in relation to examination as follows:"

"He told me him and Eddie Stewart purchased one gram of heroin the night before; it is where Eddie Stewart bought all of his marijuana and Mickey knew it, and Mickey told me that. I guess Mickey had been over there a couple of times before; I don't recall if he had been up to the house, or if he was just in the door." (R.V.I, 243)

"A gram of heroin; him and Eddie Stewart, he told me him and Eddie Stewart went to the house the night before and purchased a gram of heroin." (R.V.I, 244)

"The District Court of Wyandotte County, Kansas, would not let the Appellant present additional witnesses on the issues of material false and reckless misrepresentations of fact. (R.V.I, 245) The Kansas Supreme Court in applying the 'no attack rule' went further in finding 'the factual inaccuracies stressed by the defendant fall short of destroying the integrity of the affidavit.' (R.V.I, 246, 247) The Kansas Supreme Court, along with the District Court of Wyandotte County, Kansas, used the 'no attack rule' in relation to the petitioner, however, further rejected the petitioner's claim on the merits." (R.V.I, 246-247)

The United States District Court for the District of Kansas thereafter in its memorandum of September 1,

1978 (R.V.I, 271-276), found that the petitioner at the time of his pre-trial motion to suppress before the District Court of Wyandotte County, Kansas, on April 3, 1975, had two additional witnesses to present to the Court, however, the District Court declined to hear their testimony. (R.V.I, 273)

If we then view the United States Court of Appeals,' Tenth Circuit, Opinion (A8), it becomes exceedingly difficult to accept the Circuit's finding, "We do not consider the subsequent refusal by the state district court, in the course of the hearing on pretrial motion to suppress filed with it, to hear witnesses renders the proceedings as to the search less than full and fair. The indication is clear, as revealed by the quotation herein, that the state district court considered the facts to have been sufficiently developed. One complete and unrestricted evidentiary hearing with subsequent review by the state courts of the issue and the facts so developed would seem to be sufficient under *Stone*." (A8)

The Opinion of the United States District Court, along with the Opinion of the United States Court of Appeals, Tenth Circuit, suggesting that the Petitioner in being allowed extensive cross-examination before the magistrate on the issue of reckless false representation of fact, that this precluded federal review of this issue. (A8) *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). The difficulty in reconciling the record in support of the Circuit's Opinion is that the proceedings before the magistrate came to pass on July 18, 1974. (R.V.I, 242) During the proceedings before the magistrate the name of the informant's informer came to pass, Eddie Stewart. (R.V.I, 243) Eddie Stewart was one of the two witnesses the Petitioner subsequent to his discovery sought to have testify before the District Court of Wyandotte County, Kansas, on April 3, 1975, who would have further

supported the Petitioner's allegations herein and would have substantiated his offer of proof. (R.V.I, 29) The fact that Stewart's testimony was not recorded cannot be attributed to the Petitioner in view of the State District Court's disposition that he would not hear any testimony in relation to the Petitioner's complaints, hence, the only way Stewart's testimony could have been recorded would have been vi et armis. *Franks,* id. 171. Would it be possible to conclude from the hearing before the magistrate, which allowed the Petitioner to discover the name of the informant's informer, Eddie Stewart, that the subsequent denial by the District Court of Wyandotte County from calling Stewart as a witness in support of the Petitioner's allegations already clearly substantiated, that this would be sufficient under *Stone* or that the Petitioner was afforded a full and fair hearing before the District Court of Wyandotte County, Kansas, in relation to his Motion to Suppress.

However, if we would excise those portions of Hartman's affidavit that were determined by the Trial Court "brought into serious question the statements which were contained in the affidavit" the probable cause portions thereafter would read as follows:

> "That he has reason to believe that on the premises known as 35 South 15th Street (upstairs apt.) in the Wyandotte District of Kansas, there is now being concealed certain property, namely Cannabis Sativa L. (commonly known as Marijuana), Cocaine, and Heroin which are illegal for possession by the Uniform Controlled Substance Act, K.S.A. 65-4105."
>
> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: The assigning officer swears and affirms that he has information from a confidential informant."

It is impossible to reason that Hartman's information put forth in the affidavit that he believed or accepted. *Franks v. Delaware*, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 667. The allegations were nothing more but a deliberate and intentional falsehood to mislead the magistrate herein. *Franks*, id. 168.

From the record it clearly reflects the Petitioner has established by a preponderance of the evidence the affiant's reckless disregard for the truth and in setting aside those allegations of reckless falsity found within the affidavit it thence becomes impossible to make a finding of probable cause. *Franks*, id. 156. Are we then to reaon that the Petitioner should be denied federal review of his claims based on the state appellate review afforded herein? *Franks*, id. 172.

CONCLUSION

To deny the Petitioner review of the United States Court of Appeals', Tenth Circuit, Opinion herein would require that this Honorable Court both close its eyes and ears to the existing record and findings in relation thereto, as we have now viewed judicially accepted violations of both the Petitioner's Fourth and Fifth Amendment rights.

If this Honorable Court fails to review the Circuit's Opinion herein, then where shall we turn in pursuit of Due Process, or has the Fifth Amendment now become so elusive that we should abandon our pursuit?

Very respectfully submitted,

JOHN C. HUMPAGE
HUMPAGE, BERGER AND HOFFMAN
314 West Seventh Street
Topeka, Kansas 66603
Phone: (913) 235-5351
Attorneys for Petitioner

APPENDIX

APPENDIX A

(Filed December 20, 1979)

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1861

STEVEN CHARLES SANDERS,
Appellant,

v.

KENNETH OLIVER and KANSAS ATTORNEY GENERAL,
Appellees.

Appeal From The United States District Court
For The District Of Kansas
(D.C. # 78-3004)

John C. Humpage, of Humpage, Berger and Hoffman, Topeka, Kansas (John M. Redmon with him on the brief), for Appellant.

Thomas D. Haney, Deputy Attorney General, Topeka, Kansas (Robert T. Stephan, Attorney General, with him on the brief), for Appellees.

Before SETH, Chief Judge, McKAY, Circuit Judge, and BRIMMER, District Judge.*

SETH, Chief Judge.

*Of the United States District Court for the District of Wyoming, sitting by designation.

This is an appeal by the defendant below after denial of his petition for habeas corpus. The basic issue presented is whether petitioner was afforded full and fair litigation of his fourth amendment claims in state court so that a hearing on federal habeas corpus relief is not available. *See* Stone v. Powell, 428 U.S. 465. This case has a long procedural background with review at various stages by both state and federal courts. The defendant Sanders was convicted in Kansas state district court of possession of marijuana with intent to sell.

At a preliminary hearing in the Magistrate Court of Wyandotte County, Kansas, the defendant moved to suppress evidence seized because of misstatements in the affidavit supporting the search warrant. The affidavit states:

"AFFIDAVIT FOR SEARCH WARRANT

"Before Cordell D. Meeks, Judge of the District Court, Wyandotte County Courthouse, Kansas City, Kansas:
"The undersigned being duly sworn deposes and says:
"That he has reason to believe that on the premises known as 35 South 15th Street (upstairs apt.) in the Wyandotte District of Kansas, there is now being concealed certain property, namely Cannabis Sativa L. (commonly known as Marijuana), Cocaine, and Heroin which are illegal for possession by the Uniform Controlled Substance Act, K.S.A. 65-4105.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: The assigning officer swears and affirms that he has information from a confidential informant, who he has known for several months who has given him information in the past that has proven to be correct, that at the above address is secreted Heroin and Cocaine in one ounce lots and Marijuana in one pound

lots. The confidential informant states that this is the residence of Steve Sanders, and he has purchased the above-mentioned items within the last 24 hours.

/s/ Jack L. Hartman
Special Agent, A.G. Office"

The affiant, special agent Hartman, testified at the magistrate court hearing and was examined thoroughly by the defendant's attorney. The testimony of Hartman showed that the affidavit was indeed incorrect in several particulars. Hartman stated that he had known the informant (Mickey Harris) for several weeks and not, as stated in the affidavit, for several months. He also stated that hardly any of the informant's "leads" had "proven out" as of the time of issuance of the affidavit. However, it did appear that the informant had purchased controlled substances from the defendant within twenty-four hours before the affidavit was issued. The magistrate judge, after considering all the evidence that defendant's counsel wished to present, found that the affidavit established sufficient probable cause for issuance of the search warrant. The "no attack" rule was not considered or invoked. The ruling was on the contents of the affidavit after the admitted errors were considered.

Petitioner filed a pretrial motion to suppress in the state district court. A hearing was held on April 3 on the motion, at which a copy of the affiant's transcribed testimony was presented to the court. The state trial judge during this pretrial motion hearing considered the errors in the affidavit as advanced by defendant. The judge said of them in part:

"Well, all right. Let it be in the record; I really have an opinion as to the basis of even the representation that you have made to me, Mr. Humpage, that a judge is required to make some sort of a ruling, an inde-

pendent ruling based upon the information presented to him. And I believe that if I had been in Judge Meeks' shoes and the same affidavit had been presented to me, that I would have found probable cause for issuing a warrant.

"And, even with these facts, which you have stated to me were brought out in the record below, I'm not going to overrule the motion—the warrant or the search on these grounds. I could be wrong but—"

The motion to suppress was denied; the state district court indicated that "even with these facts" brought out in Hartman's testimony, the affidavit was sufficient. The parties had stipulated that the defendant at the hearing before the state district court had witnesses available to testify concerning the contents of the affidavit, but the trial court would not hear them.

After petitioner's trial on stipulated facts and conviction, a motion for a new trial based on alleged error in failing to suppress the evidence and failing to admit the testimony of the witnesses was denied. Appeal was then taken to the Kansas Supreme Court. Again, the affidavit was found to be sufficient on its face. State v. Sanders, 222 Kan. 189, 563 P.2d 461. After considering the facts the court also reaffirmed its own earlier holdings that one against whom a search warrant is directed may not challenge the affidavit supporting the warrant. State v. Wheeler, 215 Kan. 94, 523 P.2d 722; State v. Lamb, 209 Kan. 453, 497 P.2d 275. This "no attack" rule was the standard followed in Kansas before Franks v. Delaware, 438 U.S. 154. The Kansas Supreme Court had noted that the "no attack" rule had never been invoked against the defendant anyway. The state district court was found to have fully considered the sufficiency of the affidavit. A subsequent motion for rehearing was denied by the

Kansas Supreme Court. Certiorari to the United States Supreme Court was denied, as was a rehearing.

The petition for habeas corpus relief now before us was then filed in United States District Court for the District of Kansas, asserting again the affidavit was inaccurate and insufficient to support the warrant allowing the search and seizure of evidence. The court addressed primarily the issue of whether petitioner was granted full and fair litigation of his fourth amendment claim so that *Stone v. Powell* precludes hearing of petitioner's habeas corpus claim. The trial judge concluded that the petition for habeas corpus relief should be denied. The court did hold a hearing, however, for purposes of reconsidering its ruling in light of the recent decision of Franks v. Delaware, 438 U.S. 154, and in light of petitioner's claim that not all of the proceedings from state court were recorded in transcripts available to the court. As mentioned, the court found that regardless of *Franks* its judgment should stand since the "no attack" rule of Kansas, rendered defunct by *Franks,* was never applied. A certificate of probable cause for appeal to this court was issued. We agree with the United States District Court that the Kansas "no attack" rule was not applied by the state courts, and that factor is not an element in this appeal.

The state district court and Kansas Supreme Court both found that the information remaining after inaccuracies admitted by the affiant were excised was sufficient.

> "While the affidavit is not drawn with grammatical skill, it is sufficient on its face. It describes the premises and subject property of the search with certainty and identifies defendant as being the resident. The critical information is hearsay obtained from an unnamed informant; however, reliability is shown by the statement that previous information received proved

> to be correct and more importantly the affidavit states informant had purchased illegal drugs within the previous 24-hour period. The last statement is an admission by the informant aaginst his criminal interest." State v. Sanders, 222 Kan. 189, 191, 563 P.2d 461, 464.

The controlling issue in this case, however, is whether the petitioner was afforded a full and fair hearing of his fourth amendment claims in state court. Under Stone v. Powell, 428 U.S. 465, we may not entertain a federal habeas corpus petition if petitioner has been afforded the "opportunity for full and fair litigation of his fourth amendment claims."

As this court noted in Gamble v. State of Okl., 583 F.2d 1161 (10th Cir.), the *Stone* decision failed to provide an explanation of the "full and fair litigation" standard. The only hint to the meaning of the standard is the Court's reference to Townsend v. Sain, 372 U.S. 293. *Townsend,* of course, sets out the rules for when a federal hearing in habeas corpus is mandatory.

We have considered *Stone* in several other cases including Johnson v. Meacham, 570 F.2d 918 (10th Cir.); Sandoval v. Aaron, 562 F.2d 13 (10th Cir.); Redford v. Smith, 543 F.2d 726 (10th Cir.); and Chavez v. Rodriguez, 540 F.2d 500 (10th Cir.). When we consider the facts before us under the general standards stated in these cited cases, it is apparent that the only variation is that the initial and only evidentiary hearing was before the magistrate court, and that no further development of the facts was thereafter permitted.

The defendant does not challenge the jurisdiction or propriety of the determination by the magistrate court, nor does he assert that the court was not qualified under Kansas law or practice to make the determination that it did.

We held in *Gamble* that the "full and fair evidentiary hearing" standard of *Townsend* is not the "sole measure" of the *Stone* requirement of "opportunity for full and fair litigation." Johnson v. Meacham, 570 F.2d 918 (10th Cir.); Mack v. Cupp, 564 F.2d 898, 900-01 (9th Cir.); Graves v. Estelle, 556 F.2d 743, 746 (5th Cir.); O'Berry v. Wainwright, 546 F.2d 1204, 1211-12 (5th Cir.); *see* United States ex rel. Petillo v. State of N.J., 562 F.2d 903, 906-7 (3d Cir.). In *Gamble*, we focused on the "opportunity" aspect of *Stone*:

> "Our prior decisions applying *Stone* are based primarily on this procedural 'opportunity' aspect of the *Stone* standard. E.g., *McDaniel v. Oklahoma*, 582 F.2d 1242 (10th Cir. 1978); *Johnson v. Meacham*, 570 F.2d at 920; *Sandoval v. Aaron*, 562 F.2d 13, 14 (10th Cir. 1977) (per curiam); *Redford v. Smith*, 543 F.2d 726, 731 (10th Cir. 1976)."

"Opportunity" includes procedural opportunity to raise a claim, and it includes a full and fair hearing. In the case at bar the petitioner was afforded a full opportunity to raise his claim at an evidentiary hearing on his first motion to suppress. He raised the issue at every court level thereafter, but again the only evidentiary hearing held was in the magistrate court. In state trial court, no new evidence was admitted. Only the testimony of the affiant, given in the preliminary hearing in magistrate court, was reviewed in the subsequent state proceedings.

The fact pattern before us can be compared to United States ex rel. Petillo v. State of N.J., 562 F.2d 903 (3rd Cir.), the case relied upon heavily by the lower court below, and *Albanese v. Yeager*, a case that had been consolidated with *Petillo*. In *Petillo*, a search warrant was upheld in state court despite a showing by defendant that the telephone number used by the informant to place bets

with the defendant had been disconnected. The court there also used the "no attack rule," but nonetheless found that even with the false material excised, the affidavit was sufficient. The Third Circuit, in reviewing a habeas corpus appeal, found that the "no attack" rule did not operate to prejudice the defendant since he was afforded the "opportunity for full and fair litigation" contemplated by *Stone*. The facts of the *Petillo* case differ in one important respect, however. There, the court found that the defendant was not basing his claim on a denial of the opportunity to litigate,, but rather on "the routine credibility determination" made by the trial judge regarding the truth of factual assertions in the affidavit. Here, petitioner is arguing that the *refusal* by the trial court to hear testimony concerning factual assertions in the affidavit denied him an opportunity for full and fair litigation.

We must hold that the evidentiary hearing on the motion to suppress before the Kansas Magistrate Court which preceded the preliminary hearing was full and unrestricted, and within the "full and fair" requirement of *Stone*. This hearing included a complete examination of the affiant by defendant with several redirect examinations. This takes up some sixty pages of the transcript. The warrant was the principal issue in the criminal proceedings and the only one of substance. The defendant thereafter went to trial on stipulated facts. We do not consider the subsequent refusal by the state district court, in the course of the hearing on pretrial motion to suppress filed with it, to hear witnesses renders the proceedings as to the search less than full and fair. The indication is clear, as revealed by the quotation herein, that the state district court considered the facts to have been sufficiently developed. One complete and unrestricted evidentiary hearing with subsequent review by the state courts of the issue and the facts so developed would seem to be sufficient under *Stone*.

AFFIRMED.

No. 78-1861 — STEVEN CHARLES SANDERS v. KENNETH OLIVER and KANSAS ATTORNEY GENERAL

McKAY, Circuit Judge, concurring:

A determination of whether Sanders was afforded "an opportunity for full and fair litigation of [his] Fourth Amendment claim," *Stone v. Powell*, 428 U.S. 465, 494 (1976), is rendered unnecessary by the finding that sufficient truthful or good-faith allegations remain in the affidavit to support a finding of probable cause. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court held that "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." *Id.* at 171-72.

APPENDIX B

MARCH TERM—April 9, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Clarence A. Brimmer, Jr., District Judge*

No. 78-1861

STEVEN CHARLES SANDERS,
Petitioner-Appellant,

vs.

KENNETH OLIVER, and KANSAS ATTORNEY GENERAL,
Respondents-Appellees.

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc filed by appellant.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth, Circuit Judge McKay and District Judge Brimmer.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

---

*Of the District of Wyoming, sitting by designation